Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

KANDYTHE J. LIEPELT,

Administratrix of the Estate of
Delroy Liepelt, Deceased,
Respondent.

**On Writ of Certiorari to the
Appellate Court of Illinois,
First District, First Division**

Petition For Certiorari Filed February 26, 1979
Certiorari Granted April 16, 1979

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DOCKET ENTRIES

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,
Plaintiff,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,
Defendant.

No. 74 L 13092

Excerpts From Docket

Complaint filed August 14, 1974

Answer filed September 13, 1974

Amended Complaint at Law filed August 27, 1976

Answer to Plaintiff's Amended Complaint at Law filed September 24, 1976

Defendant's Motions for Directed Verdict filed November 24, 1976

Defendant's Motion for Directed Verdict filed December 2, 1976

Judgment entered for Plaintiff December 3, 1976

Defendant's Post Trial Motion for Judgment filed January 3, 1977

Defendant's Notice of Appeal filed March 23, 1977

Defendant's Appeal Bond filed March 25, 1977

Report of Proceedings filed May 11, 1977

Appellate Court of Illinois

FIRST DISTRICT, FIRST DIVISION

No. 77-677

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,

Plaintiff-Appellee,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant-Appellant.

Excerpts From Docket

Docketed May 11, 1977

Short Record filed May 11, 1977

Additional Record filed May 25, 1977

Appellant's Brief and Abstract filed August 17, 1977

Appellee's Brief filed March 6, 1978

Appellant's Reply Brief filed April 17, 1978

Oral Argument April 17, 1978

Order Affirming Trial Court entered July 5, 1978

Affidavit of Intent to Appeal to Illinois Supreme Court filed July 26, 1978

Application for Certificate of Importance filed August 9, 1978

Order denying Certificate of Importance entered August 14, 1978

Motion to Stay Mandate filed December 28, 1978

Order Staying Mandate pending review by the United States Supreme Court entered January 8, 1979

Supreme Court of Illinois

NOVEMBER TERM, 1978

No. 51115

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT,

Plaintiff-Respondent,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant-Petitioner.

Excerpts From Docket

Petition for Appeal filed August 30, 1978

Leave to Appeal denied November 30, 1978

Mandate issued December 26, 1978

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased,
Plaintiff,

vs.

NOLFOLK AND WESTERN RAILWAY COMPANY, a corporation,
Defendant.

No. 74 L 13092

COMPLAINT AT LAW

The plaintiff, KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased, by KARLIN AND FLEISHER and NEWCOMER, SHAFFER, GEESEY & HUTTON, complaining of the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, states as follows:

1. That on or about the 22nd day of November, 1973, the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, operating by and through their duly authorized agents and servants in their behalf were then and there in possession of roadbeds and yards wherein the defendant laid and maintained tracks and rails over which tracks and rails the defendant caused to be operated engines and cars used in the conveyance of passengers and freight for hire, and the defendants then and there employed in and about the operation of said railroad and moving of said locomotives and cars, servants and employees, all in the City of Wyatt, State of Indiana.

2. The plaintiff's decedent was then and there employed in the capacity of a fireman at or near the City of Wyatt, State of Indiana, and was engaged in performing the duties of his work at the time of the occurrence hereinafter complained of, and at that time part or all of the plaintiff's decedent's duties were in the furtherance of interstate commerce, or directly, closely, or substantially affecting such commerce; and by means of the premises at the said time and place, both plaintiff's decedent and his employer were engaged in interstate commerce, and their mutual rights and liabilities were governed and controlled by the Federal Employers' Liability Act, and plaintiff brings this action under the provisions of the Federal Employers' Liability Act.

3. That at the time and place aforesaid, and while the plaintiff's decedent was in the act of performing his duties as a fireman at or near Wyatt, Indiana, and while he was riding on a certain train of the defendant's, located on the defendant's track, said train was caused to collide and derail, which then and there caused the plaintiff's decedent's death; such action being as a direct and proximate result, in whole or in part of one or more of the following acts of negligence of the defendant's, in violation of the provisions of the Federal Employers' Liability Act:

a. Carelessly and negligently operated, managed and controlled their premises so that as a direct and proximate result, and in consequence thereof, the plaintiff's decedent sustained fatal injuries.

b. Carelessly and negligently failed to provide the plaintiff's decedent with a reasonably safe place within which to work.

c. Carelessly and negligently failed to provide the plaintiff's decedent with good and proper equipment, machinery or other appliances with which to perform his duties.

d. Carelessly and negligently failed to warn the plaintiff's decedent of the dangerous and unsafe condition that existed at the time of the aforesaid operation.

4. That the said DELROY LIEPELT, deceased, left him surviving the following:

Kandythe J. Liepelt, wife
Kyle Stanton Liepelt, son
Corey Allen Liepelt, son
Marilyn Kay Liepelt, daughter
Carolyn May Liepelt, daughter

who are his only heirs-at-law and next of kin; that by reason of the death of the said DELROY LIEPELT, deceased, the said heirs-at-law and next of kin have been deprived of large sums of money and valuable services which the said DELROY LIEPELT, deceased, was accustomed to contribute to and to perform for them, and would have contributed to and performed for them in the future, and other pecuniary damages the said heirs-at-law and next of kin of the said DELROY LIEPELT, deceased, therein and thereby by reason of his said death, then and thereafter have suffered and will in the future continue to suffer.

5. That on the 14th day of February, 1974, the plaintiff, KANDYTHE J. LIEPELT, was duly appointed and qualified by the Court of Common Pleas, Probate Division of the County of Williams, State of Ohio, as Administrator of the Estate of DELROY LIEPELT, deceased, and ever since has been and is now acting as Administrator of said Estate and brings into Court herein her letters of Administration so granted as evidence of her said appointment as Administrator herein.

6. That thereafter and subsequent to the appointment of the plaintiff herein as Administrator of the Estate of DELROY LIEPELT, deceased, by the Court of Common Pleas, Probate

Division of the County of Williams, State of Ohio, as aforesaid, the plaintiff, KANDYTHE J. LIEPELT, as such Administrator hereby commences this action in the Circuit Court of Cook County, Law Division, on behalf of and for the benefit of the heirs-at-law and next of kin of the said DELROY LIEPELT, deceased, on this 14 (sic) day of August, 1974 and within three years of the date of the death of the said DELROY LIEPELT, deceased, as aforesaid.

WHEREFORE, the plaintiff, KANDYTHE J. LIEPELT, Administratrix of the Estate of DELROY LIEPELT, Deceased, asks judgment against the defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

KARLIN AND FLEISHER and
NEWCOMER, SHAFFER, GEESEY & HUTTON
Attorneys for Plaintiff

By: PETER D. CORTI
Peter D. Corti

111 West Washington
Chicago, Illinois 60602
346-8620

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED IN PRINTING)

ANSWER

NOW COMES the defendant, NORFOLK & WESTERN RAILWAY COMPANY, a corporation, by its attorneys, Gorham, Adams, White & De Young, in answering plaintiff's complaint and says as follows:

1. In answering paragraph 1, defendant admits that it carried on railroad operations near Wyatt, Indiana at the time alleged therein.

2. In answering paragraph 2, defendant admits that Delroy Liepelt was in its employment at the time and place referred to in said paragraph. Defendant has insufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

3. In answering paragraph 3, defendant denies that Delroy Liepelt's death was caused in the manner or for the reasons alleged therein. Defendant further denies that plaintiff's decedent's death was caused by any wrongful acts or omissions of this defendant and specifically denies sub-paragraphs a, b, c, and d of said paragraph 3.

4. In answering paragraph 4, defendant has insufficient information or knowledge to form a belief as to the truth of the allegations contained therein and therefore neither admits nor denies said allegations but demands strict proof thereof.

In further answer to said paragraph 4, defendant denies that any losses that may have occurred were as a result of any wrongful acts or omissions of this defendant.

5. In answering paragraph 5, defendant has insufficient information or knowledge to form a belief as to the allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

6. In answering paragraph 6, defendant admits that the plaintiff caused to be filed a complaint in the above entitled case on August 14, 1974 in the Circuit Court of Cook County, Law Division. Defendant has insufficient information or knowledge to form a belief as to the truth of the remaining allegations contained in said paragraph and therefore neither admits nor denies said allegations but demands strict proof thereof.

7. In further answer, defendant states that any of the injuries that plaintiff's decedent may have sustained were the proximate result of wrongful acts or omissions by the plaintiff's decedent or in the alternative alleges that said wrongful acts or omissions of plaintiff's decedent caused or contributed to cause the injuries complained of.

WHEREFORE, defendant, NORFOLK & WESTERN RAILWAY COMPANY, a corporation, denies that the plaintiff is entitled to judgment against it in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) or in any other sum whatsoever.

GORHAM, ADAMS, WHITE & DE YOUNG

Attorneys for Defendant
Norfolk & Western Railway Company

GORHAM, ADAMS, WHITE & DE YOUNG
One North LaSalle Street
Chicago, Illinois 60602
CEntral 6-5428

(Verification and Proof of Service omitted)

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

AMENDMENT TO COMPLAINT AT LAW

Having first obtained leave of Court, now comes the plaintiff, KANDYTHE J. LIEPELT, Administratrix of the estate of DELROY LIEPELT, Deceased, by her attorneys, KARLIN AND FLEISHER, and files herewith amendment to Complaint at Law, to wit:

9. Defendant at the time and place set forth, wholly regardless of the duties toward the plaintiff, was careless and/or negligent in one or more of the following particulars and thereby caused accident and injury to plaintiff:

(a) In failing to use ordinary care to furnish plaintiff with a reasonably safe place to work.

(b) In failing to exercise ordinary care to furnish plaintiff with reasonably safe instrumentalities with which to work.

(c) In failing to use reasonably safe methods in the conduct of its operations at said time and place.

(d) In permittting unsafe methods to be used in its operations at said time and place.

(e) In failing to equip the east end switch stand with an adequate banner with sufficient visibility to enable engine crew operating said train on its main line to read the aspect of the signal and switch position at a sufficient distance to control the operation of its train.

(f) In permitting the existing banner of the east end switch stand to deteriorate so that the signal aspect and

switch position had insufficient visibility to enable engine crew operating said train on its main line to read the aspect of the signal and switch position at a sufficient distance to control the operation of its train.

(g) In failing to maintain the existing banner of the east end switch stand so that the signal aspect could be read by the engine crew of said train at a sufficient distance to control the operation of the train.

(h) In failing to equip the east end switch stand with signal lights in violation of statutes of the State of Indiana then and there in full force and effect, Burns Indiana Statutes, 8-8-10-1 and 8-8-10-3, to wit:

> 8-8-10-[55-1248]. Switch lights.—Every steam railroad company operating wholly or partly in the State of Indiana shall place and maintain upon each switch in said state that is connected with the main track a signal light, attached in such manner to the moving panel of such switch that it will indicate safety when such switch is set to such main track, and that will indicate danger when such switch is not set to the main track. Said light shall be kept brightly burning constantly between the hours of sunset and sunrise, and on such days or parts of days as are dark and foggy. [Acts 1901, ch. 99 §1, p. 160]
>
> 8-8-10-3 [55-1250]. Switch lights—Injuries to employees.—For any violation of or failure to comply with any of the provisions of this act [8-8-10-1—8-8-10-4], such company shall be liable to all persons and employees injured by reason thereof, and no employee shall, in any case be held to have assumed the risk incurred by reason of such violation or failure. [Acts 1901, ch. 99, §3, p. 160.]

(i) In converting the passing siding from its primary and sole purpose of meeting trains, into a storage track, when defendant knew, or should have known that the storage of cars, with brakes set, on the passing siding

could result in a collision if a train were diverted from the main track to the passing siding at the east end switch.

(j) In failing to equip the rails of the passing siding leading from the east end switch with derail devices when it knew or should have known that such devices would have avoided a collision with cars stored on the passing siding if a train were diverted from the main line track into the passing siding.

(k) In failing to provide adequate patrol of the track in said area under existing conditions when it knew or should have known that that adequate patrol would have disclosed the position of the east end switch in time to have avoided the collision of the train with the cars stored on the passing siding.

(l) In failing in the general management of its railroad operations to adequately monitor its methods and practices so that the collision of the train with the cars stored on the passing siding could have been avoided.

KARLIN AND FLEISHER

Attorneys for Plaintiff

111 West Washington
Chicago, Illinois 60602
346-8620

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

DEFENDANT NORFOLK AND WESTERN RAILWAY COMPANY'S ANSWER TO PLAINTIFF'S AMENDMENT TO COMPLAINT AT LAW

Defendant, NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, by its attorneys, ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS, in answering plaintiff's amendment to complaint at law, says as follows:

9. Defendant denies each and every allegation contained in Paragraph 9 in plaintiff's amendment to complaint at law and all subparagraphs thereof.

NORFOLK AND WESTERN
RAILWAY COMPANY

By: ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
Its Attorneys

Charles F. White
Robert L. Landess
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza—Suite 3100
Chicago, Illinois 60611
Telephone: 467-9300

(Proof of Service omitted)

TESTIMONY

* * *

[347] (Whereupon, the following proceedings were had in open Court in the presence of the jury.)

* * *

JOHN SULCH, called as a witness herein, having been first duly sworn, examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

Q. Did you know Delroy Liepelt personally? A. Yes, he was a very personal friend of mine.

[348] Q. When did you first meet him? A. In 1972.

Q. And where was that at? A. At Mountpelier (sic). I think it was probably to reflect back, it was probably at a sorority function that my wife and Dell's wife are members.

Q. All right. Can you tell me roughly how much free time you and Dell spent together as friends? A. Well, in the railroading business at the time that I was—I knew Dell—I was in retailing.

In the railroad business, coming from a railroad town, you understand that these people work nights, mornings, afternoons. So I had my afternoons free—

MR. WHITE: Please. I don't see the necessity of this, or the pertinency.

THE COURT: Overruled. I can see where we're going.

MR. FLEISHER: You may continue.

THE COURT: Proceed, sir.

THE WITNESS: Thank you.

So the time that we spent was when [349] off we played golf. I had Thursday afternoons off. If Dell was in, we played golf.

Q. What about the time that was spent together, if any, as families with your respective children? A. Quite a lot. I would say that probably we got together at least once every ten days, two weeks.

Q. . . . Can you give us some type of personal observation or background as to Dell's handiness around the home, that you personally were aware of? A. Well, basic things. He mowed his own lawn. Some people have people mow their lawn.

He built a sandbox for the boy, Corey.

I'll reflect on Corey, because he was the oldest at the time, and the other baby was an infant.

He painted the inside of their house they were living in. I happened to sell him some appliances. I remember very vividly that he was going to vent the dryer. I said, "Well, I can send a man out. It will cost a few dollars." "No," he said, "I can handle that." And he vented his dryer, [350] for example.

He cooked. He liked to cook, believe it or not. Not because he had to, but because he liked to.

MR. FLEISHER: Can you tell us, if you would, whether you had any personal experiences with Dell in his work?

Were you aware of the type of work he did, or did you visit him on the job? A. Well, I was aware of the work, because I was brought up in that town. It's a railroad town, and Dell was an operator and a fireman. And, of course, his goal was to be an engineer.

I think that is a goal of everybody in the operating profession, in that line of business.

Q. Can you tell us something about Dell's background in dealing with the children in general in the community? A. Dell had a very—knack about him that I appreciated from the standpoint, besides his own children and my children, he was very active with, very responsible with, he took time with his children. He had patience. Patience from the standpoint of [351] Corey again.

I think at the time Corey was 3 years old. Potty-training Corey, it was important to him. It was important to Dell that he knew how to hit a baseball right.

He had a little plastic bat and ball, and on occasion—every other Sunday—I shouldn't say on occasion—for a year they would watch our children, because my wife and I bowled. We'd drop the kids off. And the oldest girl and Dell would—I guess when you have a boy around the house—he would go to the girl. When we came back he was always playing with her. This deep thing of his responsibility to the children, his own, plus kids around the neighborhood.

He played with the neighborhood kids. One time he was kidding about someone who came over and asked his wife if Dell could come out and play. One of the little kids.

He was well liked by the kids. He was the type of person that it was important. My little boy would talk to him and at that time he was like, gee, two, three about Corey's age—a

[352] little older maybe—and jabber and jabber and jabber and I would take him and say, "Here," give him to my wife.

Dell would take the child and set there and listen to him. Patience. And I respected that part of the man. And I think that that's the part—that's the part that their children are going to miss.

I only hope they have the responsibility in their personalities that this fellow did, and the people that were—I did and the people that were close to him.

MR. WHITE: Judge—

THE COURT: This objection is sustained.

MR. FLEISHER: Q. John, can you tell me what type of provider Dell was for his family, in your opinion as a friend? A. Dell's a real good provider. I think, as I knew him first, as an operator, then he went to firing like anybody you start out with children, I think things weren't the best or right at the first, financially, but he certainly provided and he was proud of the fact that he had this job, railroad, because, you know, it was a job that was respectable, [353] it was a respectable job. It was a community job. And not everyone gets to become an operator, a fireman on the railroad in our area.

He was very proud of the fact, and he worked hard to keep his position.

Q. Can you tell us what instruction or training that Dell gave to his children, say, in regard to sports, that you had personally observed? A. Personally observed? I'd say mainly it was the baseball thing.

Q. Okay. A. That was because of the child being so young, he really couldn't do much more at the time. It was a living room type of baseball, I suppose.

Q. Did you have any chance to see Dell give any care or attention, or instruction to his children in every day situations, other than sports activities? A. Well, he was, I think he was like, for example, the last time that I had seen Dell alive was about a week before he got killed and they had just purchased their house they were moving into. It was the first house they had owned, and he was [354] very concerned that the kids would have a bedroom of their own. They would have a playroom that he could fix up for the kids.

I was free to run around town, because I was in the retailing business, so I could leave when I wanted to, so I was driving down to take a look at the house. I guess he told me to come down a day or two before to come down.

He was out raking leaves. And he had the little rake and Corey had the big rake. I always remember. It was important that he show Corey how to rake, and so Corey had the big rake.

That was the last time.

Q. In Dell's free time, did you ever experience—did you have experience to see him with Corey, that you personally observed? A. Sure, all the time. If he had a day off he would come up town. They had a little car seat for him. I remember the car, the car seat. That thing reflects in my mind.

And he would always have Corey in the car seat when he had a morning off, or afternoon off. He would come in the store, and we would talk. He could have left the child home, because Candy wasn't [355] working.

MR. WHITE: If the Court please.

THE COURT: Sustained.

MR. FLEISHER: John, did you ever have a chance to talk to Dell about his twin daughters?

A. A few times. I know that the daughters would come up.

MR. WHITE: I'm going to object to these conversations.

THE COURT: Yes.

MR. FLEISHER: Q. Can you tell me specifically in regard to the twin daughters, do you know if Dell ever sent them birthday gifts and Christmas presents? A. Sure. I sold him the record player right before Christmas that we wrapped up and sent to them.

Q. Were you ever aware of the twins ever visiting Dell and Candy at their home? A. They visited in the Summertime for three, four weeks at a time. That is when Dell would get them. He would have liked to have them more, like at Christmas time, but I understood that wasn't allowed.

He planned when those girls came, he [356] planned a couple of weeks for them as best he could. He took them golfing one time. I remember that. Took them swimming.

But he made sure that those girls had just as much as those two boys did, because they were his daughters, and he didn't shun those girls, or he didn't look from the standpoint, you know, that they were not living with him. That wasn't the case with Dell.

He was responsible. They were his daughters, and he would have liked to have had them. They would have been better off with Dell if he could have had them.

* * *

[359] MR. FLEISHER: Q. Mr. Sulch, can you tell the court and jury, from your own personal observations, the type of

relationship that existed between Dell and his wife and children in general? Was it a good relationship, or not, sir? A. Definitely it was a good relationship.

Q. And did you ever have occasion to witness any unusual acts, such as was Dell a heavy drinker, did he have any reputation for that in the community? A. No, no.

Q. How about a big gambler, or anything like that? A. He never mentioned gambling. I'm sure he didn't. He didn't have the money to go out and gamble. He wasn't that type of person. George.

* * *

WILLIAM HEBBLETHWAITE, called as a witness herein, having been first duly sworn was examined and testified as follows:

* * *

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

[361] Q. Mr. Hebblethwaite, did you know Delroy Liepelt? A. Yes, I did.

Q. Approximately, when did you first meet him? A. Approximately December of '72.

Q. And where did you meet him? A. At his home on East Madison Street.

Q. Would you consider yourself a close personal friend of his? A. Yes. I would.

Q. Can you give the Court and jury some idea as to how much free time the two of you spent together? A. I would say that we would see each other at least once a week, be

only for a few minutes, or be it a time that we would go with the family to the lake on a picnic or some other function, be it to the park to play.

Q. In your opinion, was Dell handy around the house? [362] A. I would say he was very handy.

Q. Can you give us some specific example of what you had observed in regard to this area? A. Well, he had a problem with the house when he had bats in the wall, and he had enough foresight to go around the house looking for spots in which these bats could enter into the house, and going ahead and covering those holes and protect them so they couldn't get back in again.

And also I can remember the instance in which he went from top to bottom in that house, painted the inside instead of having somebody else do the work for him.

Q. Did you ever have an opportunity to discuss or observe Dell in his work capacity with the railroad? A. Well, we would talk about the railroad, where his work was, or where he had been, and what had happened.

In one case, we had occasion to go down to the yard—

MR. WHITE: I'm going to object to that if the Court please, conversations.

THE COURT: Conversations are excluded and the [363] jury is instructed to disregard them.

MR. FLEISHER: Q. You started to say you had an occasion to do what? A. Had an occasion to go down to the railroad yard to see an engine, with my son, and him and his son. And he explained to us what the functions of the engine were; how they operated, how they would go in reverse, how they would go forward, and the different dials and what they involved.

Q. This is with your son and his? A. Correct.

Q. Can you tell me, in your opinion, the type of provider that Dell was for his family? A. He was a person that tried to do what he could for his family. He tried to help them out. He gave them everything he could, that he was financially able to do, without exerting himself or putting himself in a financial problem.

He tried to give them guidance; tried to give them instructions, and help in various things.

He was very patient with his children. And he was providing for them and giving them [364] instruction.

One instance at the supper table, Corey was just starting to use a knife and fork, and Dell was trying to show him how to use them properly and he told him time and time again how to use them properly without getting upset or raising his voice.

He was a very patient man.

Q. Can you tell us something of Dell's background with the handling of children in general, that went to his instruction and care, and attention to them? A. He listened to the children. He listened to his kids. He listened to my kids and he was very helpful. Even in the fact, as when we were up to the lake once, Corey and my daughter, which was the same age, were swimming and he was out with them trying to teach them to float, trying to help with the basic strokes so they would be able to swim.

He even went as far as when they got tired of this, he went up on the beach and he played with them, building sand castles.

And Corey became very upset one day [365] with his dad. As we were out there, Dell was trying to learn how to ski. Anybody that's never skied, sometimes it's very hard falling. Corey became very upset. As a matter of fact, he cried and we had to restrain him from trying to help his dad, because he thought his dad was hurt at this time.

Q. Do you have any personal knowledge, or observation, Bill, as to the time that Dell spent with primarily Corey, when he was off work, relief days? A. When I first knew Dell, and we started to really get together, we were in the process of redoing a home ourselves, and he would come down quite frequently and give advice, and he always had Corey with him whether it was just for a few minutes or an hour but Corey was always with him at these times.

Q. Did you ever have an opportunity to see Dell giving any instruction to Corey in regard to sporting activities? A. Yes. He was a very—he wanted Corey to be a sportsman, because I guess this is always the father's dream that their kids are going to be active in sports in school, and he was always showing [366] Corey how to throw a baseball. And he had a plastic bat and baseball in the house, and he was pitching to Corey to help him do this.

Q. Bill, did you ever see Dell's twin daughters with him or visiting with him and Candy? A. Yes, I did.

Q. Can you tell me or did you know how often they would come and how long they would stay? A. I believe that if I remember correctly, I saw them twice, and it was always in the Summertime and it was always for a period—well, it seemed like three or four weeks at the period of time they were there.

He was a proud father, and he showed a great deal of patience with the twins. Very helpful. Very instructive to them. He tried to help them in everything that they did.

He always seen while they were there that they had something to do, or go to the park, or I have had my children down playing with the girls. He was always trying to keep them occupied so there wasn't actually a dull moment for them.

Q. Were you ever aware of any times that Dell sent gifts or presents for holidays to the twins? [367] A. Yes. There were occasions, which I can remember the—at Christmas time, when he was talking about sending gifts to his kids, and he was very concerned of the fact of getting them in the mail on time so they would get them before Christmas and not a period of time after. So that they would know for sure that they did have a Christmas present coming from him.

Q. Did you ever have a chance to see Dell drink heavily, or be intoxicated, drunk? A. No, I didn't.

Q. Are you aware of any gambling or characteristics that Dell had? A. Not to my knowledge, sir.

Q. Did you and Dell, your families, belong to the same church? A. Yes, we did.

Q. Did he and you attend the church with your families and children on a regular basis? A. Yes, we did. If he was there a lot of times we would sit together. In the Wintertime it was more frequent than the Summertime because he was outside with the kids, or maybe he was out playing golf, or something of that type.

MR. FLEISHER: Thank you, Bill.

* * *

[370] REDIRECT EXAMINATION

BY MR. FLEISHER:

Q. Mr. Hebblethwaite, your fourth and fifth children would be the ones who are closest in age with Candy and Dell's two sons, is that correct? A. That is correct, sir.

Q. Then most of the experiences that you have related, when I questioned you before, I take it dealt with those youngest two children and the Liepelts' two boys? A. That is correct.

* * *

[461]KANDYTHE JEAN LIEPELT, called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

Q. What is your date of birth? A. April 29, 1945.

Q. And how old would that make you now? [462] A. Thirty-one.

Q. Were you ever married? A. Yes.

Q. To whom? A. Delroy Liepelt.

Q. What was the date that you were married? A. October 8th, 1968.

Q. And where? A. Montpelier.

Q. Was this your first and only marriage? A. Yes, it was.

Q. And in regard to Del, was that his first marriage or not? A. No, his second.

Q. Can you tell me or do you know the name of his first wife? A. Yes, I do.

Q. What is her name? A. At the moment her name is Lucille Carol Tompkins.

Q. And do you know—

[463] MR. WHITE: Excuse me. Lucille what?

THE COURT: Tompkins. T-o-m-p-k-i-n-s.

MR. FLEISHER: Q. Did their first marriage—did Del's first marriage to Mrs. Tompkins end in divorce? A. Yes, it did.

Q. Do you know approximately when that divorce was obtained? A. The early part of the year, February or March, '67.

Q. Were there any children born out of that first marriage? A. Yes.

Q. How many? A. Two.

Q. Their names? A. Carolyn May Liepelt and Marilyn Kay Liepelt.

Q. Do you know their date of birth? A. May 18th, 1960. The same day as their father's birthday.

Q. They were both—they are twins, I take it? A. Yes, they are.

THE COURT: Carolyn and Marilyn?

[464] THE WITNESS: Right.

MR. FLEISHER: Q. The two girls are currently how old, then? A. They are 16.

Q. And where do they now live? A. Whitefish, Montana.

Q. With their mother? A. Yes.

Q. From the time that Del and his first wife were divorced, did Del support, in any way financially, his two daughters? A. Yes, he did.

Q. Was this done pursuant to some order of court? A. The divorce decree, yes.

Q. And do you know the amount of the child support that he contributed to his daughters? A. $120 a month.

Q. And for how long a period of time that you know had Del paid that sum of money? A. The entire time I knew him, every month.

Q. And that would be approximately how many years? A. About seven-and-a-half.

[465] Q. Were you personally aware of any time that he failed to make that monthly support payment? A. No, I'm not.

Q. Was this done by check do you know? A. Yes, it was. After we were married I wrote the checks.

Q. And you would then mail them, I take it? A. Yes.

Q. On a, as we said, a regular month-to-month basis? A. Yes.

Q. Did Del and you visit with the twins at any time? A. The twins came to visit us, yes.

Q. And was this done on any type of a regular basis? A. Yes. Every summer they spent, depending on the year and the circumstances, three to five weeks with us.

Q. Living with you? A. Yes.

Q. And during that time that they would [466] visit on vacations, did you have an opportunity to observe Del in the way he treated them? A. Oh, yes.

Q. And could you tell us, in general, the type of care or attention and guidance that he gave during those lengthy summer vacations that you observed? A. Well, whenever possible, when he knew they were coming, he would try to work his schedule where he had some time off. Occasionally he even took part of his vacation during their visit so that he could spend time with them because that was the only time he got to spend with them during the year.

We took them to amusement parks and took them to Cedar point (sic), which is an amusement park in Ohio. Before we moved to Montpelier we lived in Chicago. We took them to the Brookfield Zoo. He did things at home with them, projects. They were with him whenever he was not working.

Q. Did you notice any difference in his treatment or attention to his twin daughters as opposed to his own children, that is his—his additional children that he had with you? [467] A. No. I think he treated them both, all four of them, the same.

Q. Did you and Del or Del alone send any gifts at any time during the holidays to the girls? A. Yes. Del and I, together, sent them, every Christmas and every birthday we sent them presents, and special times in between, Valentine's Day and so on.

Q. Easter? A. I don't recall whether we ever sent them anything for Easter or not.

Q. Can you tell us what the general health condition was of your husband during the time you were married up until November of '73? A. He was in excellent health.

Q. Had he ever had any serious operations? A. Not while I knew him, no.

Q. Any serious or major hospitalizations? A. No.

Q. Did he have any extended time off of work due to any physical problems that you were aware of? A. He had an injury about a year before he was killed. On the railroad he hurt [468] his ankle. He was off for, I don't remember, I think four or five weeks.

Q. And was that the only injury that he had had during the time that you knew him? A. Yes.

Q. Can you tell us what your general health is? A. Excellent.

* * *

[483] Q. Mrs. Liepelt, can you tell the Court and jury what the general health of was of Del's twin daughters on and before November 22, of 1973? [484] A. The boys had excellent health.

Q. Were there any children born from your marriage to Delroy Leipelt (sic)? A. Yes, two.

Q. Can you tell us their names and dates of birth? A. Corey Allen Leipelt was born July 19th, 1970 and Kyle Stanton Liepelt was born on July 11th, 1973.

Q. How old were the boys at the time of this accident? A. Cory (sic) was three years and four and a half months or four months and Kyle was just four and a half months.

Q. I'm sorry, four—A. Four and one half months.

Q. Can you tell me what type of help Del gave you with your oldest son, Corey, from the time of your late pregnancy until shortly after he was born? A. He did basically everything I did. He helped change diapers. He helped with feeding. He would get up in the night, just like I did. We'd take turns. He got on the floor and played with him. He taught him, when he got old enough [485] to walk he taught him how to walk, helped with him. He helped me fix meals or fed the baby while I was fixing meals.

Q. Would much of the same answers apply to when your youngest child, Kyle, was born? A. Yes.

Q. Did Del give any special attention and guidance to your oldest son, Corey, that you can describe to the Court and jury? A. Yes. I would say it was exceptional.

Q. In what respects? A. All the time that he had off he would spend with his son or with us as a family, but quite often with just his son. He let him help him mow the lawn. He had a little lawn mower, he used to follow along behind his dad. He built a sandbox for him. He taught him how to play catch, how to hit a bat—hit a ball with a bat, took him golfing with him, taught him how to swim or tried to teach him how to swim. He's still a little afraid of the water. He was very, very patient with him.

* * *

[486] MR. FLEISHER: Q. Do you personally know if Corey remembers his father? A. Yes, he does. They were extremely close.

Q. And do you personally ever speak to Corey about his father?

MR. WHITE: Same Objection.

THE COURT: Sustained.

MR. FLEISHER: Q. What was your husband's position with the railroad initially and up until the time of his death? A. When he started with the railroad he was an operator, and (sic) agent operator. They are called operator because at one time it was a telegrapher's position, telegraph operator. They sometimes still operate the telegraph, but that's why they are called operators, an agent operator. He was on the extra board, which meant he worked vacations and people's

time off until he gained enough seniority to work on his own, and then he became a fireman.

[487] Q. And can you tell us what type of attendance record your husband had while working for the railroad? A. I would say it was excellent. He never took time off unless it was something extremely important or he was sick.

Q. Have you noticed that from the time that your husband died up to the present any particular problems with either of your sons? A. Yes.

Q. Can you tell us what you have observed?

MR. WHITE: That is objected to.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. My oldest son, Corey, becomes quite upset. Once in a while I'll see him sitting in a corner crying for no reason at all. When I question him as to why he's crying, I find out that it's because he misses his dad.

* * *

[488] MR. FLEISHER: Q. Can you tell me who handled the family finances during the marriage? A. I would say mainly me. We both did, but since Del worked such unusual hours, he gave his paycheck to me and I would deposit it and pay most of the bills.

Q. Did you have a joint checking account? A. Yes, we did.

Q. Were you on any type of an allowance or budget? A. No, not really.

Q. Did Del always give you his paychecks? A. Most generally yes or else he would, if he happened to be, which

wasn't usually the case the day he got paid, but if he did happen to be off that day he would sometimes go deposit it himself.

Q. How often was he paid by the railroad? A. Twice a month.

Q. Did he keep out any type of expense money for himself? [489] A. Yes, fifteen or twenty dollars a week.

Q. What about his lunch? Did he eat out or did you make his lunch or what? A. I generally packed his lunch for him.

Q. Did Delroy spend money on himself, say for clothing? A. I wouldn't say it was much.

Q. Can you give us an approximation per year what he would spend on clothing? A. Oh—

MR. WHITE: That's objected to. Be hearsay.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. I would say 200, $250 a year.

Q. Did he spend much money on himself for personal things? A. No.

Q. Can you tell us if your husband was handy around the house in any ways? A. Yes.

Q. Can you give us some examples? A. Yes. Together we painted the entire inside of the house that we were living in. It was a rented house, so the owner bought the paint and we did the work. He did some minor plumbing when the faucets [490] went bad. He mowed the lawn. He maintained the yard himself. He antiqued some furniture. We had some bookshelves that he had made and hung himself. When we bought a washer and dryer he installed it himself.

The house that we lived in did not have a garage when we moved there and the owners bought a garage and moved it in and Del helped with that, and he hung the garage doors and did all that work himself.

Q. Did Del drink to excesses? A. No. He'd have a beer occassionally (sic). That's all.

Q. How about gambling? A. No.

Q. Were you and your husband able to save any money? A. Yes.

Q. Did you have a specific savings account? A. Yes, we did.

Q. Do you know approximately how much money you were able to save per year? A. From a thousand to two thousand a year. Sometimes three, depending on the year.

Q. Can you tell the court and jury, Kandythe, [491] what type of provider was Del for you and the boys? A. I thought he was a very good provider.

Q. Prior to his death you rented a home? A. Yes.

Q. Had you and he made any plans, concrete that is, to buy a home? A. Yes, we had.

Q. Can you tell us those? A. We had signed papers to buy a house the day before he died.

Q. Can you tell us something about the house, the size? A. It was a three-bedroom home, living room, dining room, had a small extra room as a play room, kitchen, full basement, garage, nice sized yard.

Q. In regard to providing for your children, can you tell us what type of provider he was for them specifically? A. We

lived very comfortably. He—they were always well fed and well clothed and well taken care of. He loved them very much.

Q. What about providing for you personally? Would the answer be the same? A. Yes.

Q. During the period of time that you were [492] raising your children, did you have to work outside of the home? A. I worked for a six-month period.

Q. When was that and where? A. It was Montpelier and I don't remember the exact year. It was when Del was between being an operator and a fireman. Things were a little slow and I worked then for six months.

Q. Was that the only time from when you gave birth to Corey up until your husband's death that you sought work outside the home? A. Yes.

Q. Can you tell the Court and jury, Kandythe, what type of personal relationship did you and Del have? A. Very close.

Q. Can you tell us some of the things that you did together? A. Well, I would say anytime that he wasn't working we were together as a family or as a couple. We took vacations together. We spent holidays with my family, my parents and his sister and brother and mother. We just did everything together.

Q. Can you tell us of any hobbies or sports that you did as a couple? [493] A. Yes. We would go boating with friends or swimming. We bowled together. We were on a bowling league together, mixed couples, mixed doubles. We played golf together and when he died we had bought tennis rackets. We were going to take up tennis next spring.

Q. Did Del ever help you in and around the house with any of your chores? A. Yes, he did.

Q. Can you tell us what type of things he did with you in and around the house? A. He cooked, partly because he liked to and partly to help me. If I was busy with the children, especially when Corey was a baby and when Kyle was a baby, when they were small he would help vacuum and dust and make beds and he helped do all my house work when I was busy or didn't have time.

Q. During the—strike that. You were married a total of how many years, Kandythe? A. Just a little over five.

Q. And during that five-year period did you ever have any type of legal seperation (sic) or voluntary seperation (sic) from your husband? [494] A. Oh, no.

Q. How would you describe your marriage in general to the Court and jury?

MR. WHITE: I think that's already been done.

THE COURT: Overruled.

MR. FLEISHER: Q. You may answer. A. I would say it was a exceptionally close marriage. We weren't—we weren't just husband and wife. We were best friends.

Q. Kandy, did you work at any time or have you ever—strike that. Did you work at any time after Del's death? A. Yes.

Q. And when did you start working. A. Approximately a year and a half after his death.

Q. And where was that? A. At the Holiday Inn in Montpelier.

Q. Doing what type of work? A. I was a desk clerk, reservations.

Q. Are you still working there? A. No, I'm not.

Q. Are you working now? A. Yes.

[495] Q. Where are you working now? A. Montpelier Primary School.

MR. WHITE: I'm sorry. I din't (sic) get that.

THE COURT: Montpelier Primary School.

MR. WHITE: All right.

MR FLEISHER: Q. And what do you do there? A. I'm cafeteria supervisor and office help.

Q. How many days a week are you working now? A. Five.

Q. Do you have any expenses now that you did not have before the accident or expenses that were family expenses then that are additional now? A. All the family expenses we had then I still have, plus when I go to work I have to hire a baby-sitter.

Q. And how much do you—do you pay a baby-sitter weekly now since you work five days a week? A. Yes, I do.

Q. How much do you pay the baby-sitter? A. $15 a week.

Q. I'll show you what has been marked and received in evidence as Plaintiff's Exhibits Nos. 9, 11, 12 and 15.

In fact, well, what I'd like you to do, can you come down for a moment in front of the [496] jury, Kandythe?

(Whereupon the witness stepped down from the stand.)

MR. FLEISHER: Q. What I'd like you to do here in front of the jury is take each of these photographs, tell them what they show and approximately when they were taken and then as you finish the four of them, then we'll pass them around to the jury. Just take your time. A. That's Del and his twin daughters and our oldest son, Corey was about three at the time. Was about a year before he died.

THE COURT: Who took that photograph, do you know?

THE WITNESS: I did.

And that's Del, is laying on the floor and he has our youngest son, Kyle, on his chest, and that's Corey. He was playing with them. That was about a month before he died.

THE COURT: Who took that picture?

THE WITNESS: I did.

Coloring Easter eggs, Del and Corey, was taken about a year and a half before he died on Good Friday.

[497] THE COURT: Who took that picture, if you know?

THE WITNESS: I did.

And that's Del and our oldest son, Corey, our youngest son, Kyle, and me. That was taken one month before he died, the day Kyle was baptized.

(Whereupon the witness resumed the stand.)

MR. FLEISHER: May I circulate these?

THE COURT: Please.

MR. FLEISHER: In 1973, Kandy, can you tell us what the approximate earnings were of Del's? A. About $13,000.

Q. 13,000? A. Yes, sir.

Q. I have no further questions. Thank you.

* * *

[507] REDIRECT EXAMINATION

BY MR. FLEISHER:

Q. Kandyth (sic), you testified on cross-examination that Del began working for the railroad in approximately '71. Was he steadily employed, to your knowledge, before 1971?

Want me to repeat it? A. Yes, he was, but not by the railroad.

Q. That's what I mean. A. Oh, yes.

Q. He did have employment? [508] A. Yes.

Q. Various types of work. Did he ever do any type of—strike that. Did he play any type of musical instrument? A. Yes. He played the piano beautifully.

Q. Did he have any special training for the piano? A. Yes. He took nine years of piano lessons.

Q. Did he ever work professionally playing the piano? A. Before we were married, yes. He worked part-time.

Q. And where was that, in what city or town? A. In and around Chicago.

Q. Okay. How long did you work at the Holiday Inn in Montpelier? A. A little over a year.

Q. And you then changed jobs? A. Yes, sir.

Q. What the purpose of your changing? (sic) A. More money.

Q. Did you work full-time at the Holiday Inn? [509] MR. WHITE: I'm sorry. I didn't get the answer.

THE COURT: More money.

THE WITNESS: Yes, I—I'm sorry. What did you say?

MR. FLEISHER: Q. Him or me? A. You.

Q. Okay. Did you work full-time at the Holiday Inn? A. No, no, part-time.

Q. Was there any purpose for part-time employment by yourself? A. Yes. I have two small children and I don't feel that I can leave them full-time.

Q. Now that you're working at the Montpelier Primary School, you're working every day, as I understand it? A. Yes, sir.

Q. Do you work full-time there? A. No. I work four hours a day.

Q. Five days a week? A. Yes, sir.

Q. And what is the purpose for working just the four hours a day, five days a week? A. So I can spend more time with my children.

[510] Q. Does—strike that. Does Kyle go to any type of a nursery school? A. Yes. He goes to nursery school two mornings a week for two hours.

Q. And the other time he is with the sitter until you come home; is that correct? A. Yes.

Q. You testified that Corey is doing well above average work in school? A. Yes, sir.

Q. Who helps him with his homework? A. I do.

Q. Had you discussed with your husband before he died any type of college education for your children?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Had you or your husband made any provisions financially for your sons' ultimate college education?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Did you have any specific plans, [511] you personally, or (sic) your children's secondary education? A. Yes, sir.

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLEISHER: Q. Did your husband graduate from grade school? A. Grade school?

Q. Yes. A. Yes.

Q. Did he have a high school diploma? A. Yes, he did.

Q. When the twins came to visit from Montana, how did they travel? A. Sometimes by train and sometimes by airplane.

Q. And who paid the expenses of their traveling to Ohio to visit? A. We did.

Q. Had any money been set aside by you and your husband before his death for your children's further education?

MR. WHITE: That's objected to.

THE COURT: Overruled.

[512] MR. FLIESHER (sic): Q. You may answer. A. Yes, sir. That was part of our savings.

Q. And was there any other purpose or function for that savings account other than their further education?

MR. WHITE: That's objected to.

THE COURT: Sustained.

MR. FLIESHER (sic): Q. When were you notified of this accident? A. About 10:00 o'clock in the evening.

Q. And what evening was that? A. November 22nd.

MR. WHITE: Excuse me. I thought this had been covered. It's not redirect.

MR. FLIESHER (sic): I don't believe it was covered in my direct examination. If it's not proper redirect, I'd ask for leave to open my direct examination for a short period.

THE COURT: It was not covered in you (sic) direct and it was not covered in the cross-examination and I will grant your request to reopen your direct.

MR. FLIESHER (sic): Thank you, Your Honor.

Q. Around 10:00 o'clock in the evening? A. November 22, 1973, Thanksgiving Day. It [513] was three years ago today.

Q. I know this is difficult. Can you tell us where you were when you were notified? A. I was at my parents' house.

Q. And do you know who called and advised you of the accident? A. My father told me.

Q. And do you know who had notified him? A. Someone from the railroad.

Q. And were you told on that evening, on Thanksgiving evening, that there had been an accident? A. Yes.

Q. Were you told what, if anything, was the condition of Del? A. I was told he was crushed to death.

Q. I have nothing further. Thank you.

* * *

[653] MR. FLEISHER: May I proceed, your Honor?

THE COURT: Yes, sir.

MR. FLEISHER: Thank you.

The plaintiff Liepelt has marked as Plaintiff's Exhibit No. 25 for Identification the same National Labor Contract covering all unions in the national agreement and would, at this time, wish to offer it in evidence.

Any objection?

MR. WHITE: No.

THE COURT: It is admitted, and what's that, Exhibit No. 25?

(Whereupon, Plaintiffs' Exhibit No. 25 was received in evidence.)

[654] MR. FLEISHER: This is the national agreement that is in effect for all trades. The effective date being October 1st, 1972.

In 1974 there was a four percent effective increase which would have made Mr. Liepelt's 1974 total earnings $13,596.36. Effective January 1st, 1975 there was a ten percent reat (sic) increase. Effective October 1st, 1975 there was a five percent effective rate increase making his 1975 total earnings $15,142.92.

On January 1st of 1976 there was a 1.86 percent effective increase. On April 1st, 1976 there was a three percent effective increase which would have made his 1976 total earnings $16,378.20.

Effective July 1st, 1977 (sic) there will be a four percent increase making his total 1976 earnings, $16,828.26.

* * *

[664] (Whereupon, the following proceedings were had in open court, out of the presence of the Jury.)

MR. FLEISHER: Your Honor, the Plaintiff is called an economist and I would like to make an oral motion in limine at this time.

I am certain Mr. White knows there can be no mention of income tax under Illinois law and I refer specifically to the case of Hall vs. The Chicago & North Western Railway Company.

THE COURT: May I suggest, sir, that you examine your witness first. Then after I have a chance to digest what his testimony has been, I will entertain your motion in limine with regard to Mr. White's cross-examination.

I don't know what you're going to bring out, so I can't anticipate what his cross will be.

MR. FLEISHER: All I am going to bring out, nothing as to any type of State or Federal law income tax, which is the Illinois law, and I know Mr. White is aware of it.

[665] THE COURT: If you're not going to bring out anything along those lines, of course you can't cross-examine on anything you haven't touched upon, but let's see what his testimony is going to be first, please.

MR. WHITE: If the Court please, with reference to what we discussed before we adjourned, the reading of certain admissions, I wasn't waiving the initial objections I made to them.

THE COURT: The record is clear. Thank you, sir.

(Whereupon, the following proceedings were had in open court in the presence of the Jury.)

MR. FLEISHER: Your Honor, may I ask leave to reopen my direct examination of Mrs. Liepelt for roughly 20 seconds, and a couple brief questions, which she can answer from her seat.

THE COURT: Madame, I'd like you to consider yourself under oath.

THE WITNESS: Yes, sir.

KANDYTHE J. LIEPELT, recalled as a witness herein, having been [666] previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

Q. Can you tell us what your husband's date of birth was?
A. Yes, May 18, 1936.

Q. Can you tell us how old he was when he was killed?
A. 37.

Q. Do you know if your husband had any type of fringe benefits from his employment with the Defendant railroad?
A. Yes, he had health—

MR. WHITE: I'm going to object to that, if the Court please.

THE COURT: Overruled. You may answer.

THE WITNESS: He had hospital disability plan, and he had railroad credit union plan.

* * *

[667] BERNARD FRIEDMAN, called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FLEISHER:

* * *

[670] MR. FLEISHER: . . . Doctor Friedman, do you have with you a table which is used for the calculating of life expectancy of individuals? A. I made a copy of the life table for 1973, from the statistical abstract of the United States. I hope that I have it with me.

Q. And, Doctor—A. Yes, I do have it.

Q. Doctor, is that the acknowledged authority in the United States, or one of the acknowledged authorities for computing life expectancy? [671] A. Yes, it is.

Q. Can you tell me, Doctor, in using that table what would be the life expectancy for a male who was 37 years of age in 1973? A. It would be something more than 34 years.

Q. Can you tell us, Doctor, what are the elements necessary for calculating the pecuniary loss where that is involved in the death of a man who leaves a wife and children? A. I have gone by the Illinois Jury instructions, and some other handbooks for expert witnesses, and I would be happy to explain the four elements.

There is the gross earnings a person would have had. There's the employer contributions to fringe benefits. There's

the value of household service that a person would have contributed at home, and as an offset to these contributions there's the amount that a person would have consumed himself, personal consumption.

Those are the four elements.

Q. Dr. Friedman, starting with the first one, in regard to gross earnings, can you give the Court or Jury some type of a historical [672] example or basis for explaining that term, so that we can understand it? A. Would it be all right if I bring the chart over?

THE COURT: Yes, sir.

(Whereupon, the witness left the witness stand.)

THE WITNESS: There were plenty of easels, but I brought my own.

I do want to illustrate the various procedures and concepts that are used in calculating pecuniary loss

THE COURT: You mean money lost, don't you, Professor?

THE WITNESS: Monetary loss.

THE COURT: The loss of money. Pecuniary is a word we sometimes don't use very often in our speech.

THE WITNESS: Something we can put a price tag on.

First, I want to show you something about what the historical record has been for long periods of time as to a person's earnings. So I asked you to think about a man who was earning [673] $5,000 per year in 1955. What would his total earnings have been over the next 20 years if he had done as well as the average worker.

Well, if earnings didn't grow at all from year to year, the total received over that period would simply be a (sic) $100,000; 20 times 5. However, the historical experience is that earnings have grown something more than five per cent on average per year over that period, and acknowledging or using that growth to calculate year by year what these earnings would have been, you would get a total of $165,000.

THE COURT: Let me ask you what you mean by "annual growth?"

Are you taking into consideration inflation, or a man getting promoted in his job?

THE WITEESS (sic): Well, technically, what they would be described by the Department of Labor, the wages paid per hour, that historically has had two components, and it's been about half productivity increase, which is due to training and due to the expansion of the plant equipment of industry, and the other half has been a poor compensation for the growth of prices.

[674] If you want people to keep working for you, you have to keep making it attractive in terms of what they can buy with it.

THE COURT: And five per cent is some kind of an average? Is that what you are saying?

THE WITNESS: I want to show you the particular years what this actual growth was.

These are five years in that period, and you can see that some years is higher, some years is lower. I won't comment on the political correlation here, but it's interesting to see that it could be high and it could be low.

And really when we're looking for a long period of time, we can't necessarily go by the last five years, the last year.

We want to take a period somewhat commensurate with how far in the future you're looking at.

So I computed a 20-year average and that was 5.6 per cent a year. On each year, on the average, earnings move by 5.6 per cent.

MR. FLEISHER: Professor Friedman, that would be in answer to His Honor's question as to how you came to the 5 per cent figure that was on the first page, is that right? [675] A. I don't want—I don't like to assert my own judgement (sic). I like to take the historical record and say what is conservative interpretation of the historical record. By "conservative," something that tends to keep all the dollars we calculate low, so I took a five per cent rate rather than a 5.6 in the illustration.

Q. Now, Doctor, can you turn back to the first example, and under B, where you have that 5 per cent annual growth of $165,330.

Where you have the settlement, is there anything that you have to use into your calculations to reduce that $165,000 amount to a present cash value in your calculations? A. Yes, there is.

Q. All right. A. There are earnings—this is a total that he would have received over a 20-year period and what we'd like to do is to take a whole future history like this and ask: Well, how much would that be worth today in a lump sum?

And that's where we bring in the concept of present cash value. A dollar that you're not going to receive for ten years, that is [676] not worth as much as a dollar today, because if you had a dollar today, you could invest that dollar and earn interest on it and in 20 years you would have more than a dollar.

So we want to take these future dollars and reduce them to their present cash value.

Q. Professor Friedman, can you show us, by way of hypothetical, in your chart as to what effect the reduction to present cash value, and how you arrived at it, would affect those numbers? A. All right, I will. I ask this question: What would this earning history, or this earning stream be worth in terms of present cash value in 1955?

And in order to do that, I have to make an assumption about what kind of interest rate has been earned of that lump sum over that 20-year period. Before I tell you about this hypothetical calculation, let me see if I can add one sort of interpretation to explain present cash value.

If we had, say, a 20-year period, we're concerned about, you could think of [677] starting 20 different bank accounts today. Each bank account is going to be totally withdrawn and closed on each one of those 20 years, but you put in the money for it today.

So you can see that the account that you're going to close next year, you have to put whatever will be enough that will—that with one year's interest will just be equal to what you want to take out in a year. An account you're not going to touch in 20 years, you don't have to put in as much today, because of the interest it will earn over that period, by the time 20 years rolls around, and you'll have a larger sum of money to meet that withdrawal.

The point of that example is just to emphasize at the end of 20 years there would be nothing left. It would be like closing 20 bank accounts.

Now, that calculation for the earnings of the example, $5,000 per year, growing at 5 per cent, using a 7 per cent in-

terest rate as to what that fund could have earned, gave rise to my estimate of $82,500.

So you can see that that does [678] reduce money based on the fact that money that you receive in a lump will earn interest between now and the time you have to use it.

Q. Professor, how did you arrive at the 7 per cent number that reduces that $165,000 down to $82,500? A. Well, there is no single interest rate that everyone should use, because in this interest rate, as you know, there are lots of ways of investing your money. There's a lot of ways of saving money. There's lots of securities that earn different rates of interest, and, in general, riskier securities earn you more, more interest.

And I really—it's not my position to estimate how much risk a person is going to take.

So what I did, basically, was to look at the same 20-year history of interest rates on the safest long-term securities which are Treasury Bonds or Triple A corporate bonds, and over that period the safest return was about 5 per cent on average.

However, I wanted to use an [679] interest rate that would be realistic in terms of what we're going to do about future projection. As you know, today, interest rates are a little higher than they have been historically, and Treasury bonds that you're going to go out and invest in have yielded in the 7 per cent neighborhood, and sometimes higher.

I took the figure 7 per cent because it's realistic in terms of safe assets today, that you might invest in for the long-term.

THE COURT: What is a Treasury Note or bond that you're talking about?

THE WITNESS: Well, I guess most of us are familiar with the little bonds we get on our birthday, where you pay $18.75. Then in ten years you get $25.00 back.

Well, in bigger denominations these bonds are generally on a face value of thousand dollars each. So you would buy it for a thousand dollars. In ten years you're going to get that thousand dollars back, but if in the meantime you have little coupons, or you have—it's registered with the government—so each [680] year you'll be able to get the interest on that thousand dollars.

I guess people can raise their hands if they have questions.

[681] MR. FLEISHER: Can you go back up on the witness stand and we'll continue.

(Whereupon, the witness resumed the witness stand.)

MR. FLEISHER: Q. Dr. Friedman, I want to ask you the following hypothetical question, and I want you to assume these facts.

First, that a male was born on May 18, 1936, and came to his death on November 22, 1973. He would have been at that time 37 years of age.

Further assuming that he was employed as a fireman for the Norfolk and Western Railway Company, and that for the period of 11 months prior to the date of his death he received gross earnings of $11,988 from his job as a fireman;

That under a union agreement effective October 1, 1972, which he was a party to, he would have received the following gross earnings up to and including December 31, 1977:

For the year 1974, gross earnings would have been $13,596.36; for the year 1975, gross earnings would have been $15,142.92; for [682] the year ending 1976, gross earnings

would have been $16,378.30; for the year 1977, gross earnings would have been $16,828.26;

That the railroad he worked for had a compulsory retirement age of 65 years. That through his union contract he had certain fringe benefits, including employer contributions toward health, disability plans, hospital plan, and credit union participation;

That he spent personally betwen $15 and $20 a week for his own personal consumption of goods, and that he spent furthermore $250 a year for his own clothing and other personal items.

He was in excellent health up to and immediately before his death. He further performed many household services, including painting, carpentry, home and land maintenance, appliance installation, door hinging (sic), and minor plumbing in and around the home.

He left as his heirs and next of kin a widow born April 29, 1945. He also left four children; twin daughters born May 18, 1960, a son born July 19, 1970, and another son born [683] July 11, 1973;

That he undertook numerous child care activities, including night feedings, diapering and dressing of the children, babysitting, and sick bed functions.

He furthermore actively participated and contributed in the training, guidance, advice, attention, and instruction of his children.

Now then, Doctor, assuming all these facts which I have just given to you as true, and based upon your own experience and training and interpretation of standard life tables, and also upon a reasonable discount factor, and historical ex-

perience of wage increase, do you have an opinion as to the present value of future losses? A. Yes, I do.

Q. And, Doctor, can you tell us what that opinion is? A. Why don't I give you the total present cash value estimate. Then we can talk about the elements that go into it.

Q. Fine. [684] A. The total is approximately $302,000.

THE COURT: That is the cash value of his gross earnings?

THE WITNESS: That is the present cash value of the contributions to the wife and dependents, or in other words the pecuniary loss.

THE COURT: Thank you.

MR. FLEISHER: Q. Doctor, can you tell us how you arrived at that figure, using whatever you have to explain or to demonstrate? A. Okay. Well—I'm sorry. I'd like to ask you to again draw your attention to the easel.

(Whereupon, the witness left the witness stand.)

THE WITNESS: Well, I tried to summarize in one table the four elements of monetary loss, and offsetting factors to be considered in the total present cash value.

And the period really breaks down into two. First, 1973 to the present, which is based upon earnings which are given by the recent union contract. The future period until retirement [685] at age 65 is the 24-year period from 1977 through 2000.

Now, in each period I calculated the gross earnings using that historical 5 percent growth assumption, fringe benefits. That is the cash value of employer contributions to health insurance, disability plans, and so forth.

I estimated as 5 percent of gross pay. There is a standard package of Travellers and Aetna plans the railroad unions

have negotiated, and I have looked at that package, and those three items are in general more than 5 percent of a person's gross pay.

Then the household service I estimated to—it's hard to put a price tag on a lot of those things, and there are some I didn't try to put a price tag on—but I did make some effort to estimate household service, and I attached a 9 percent of gross pay as household service. I'll explain that possibly later.

Finally, against the income and services in this you have to offset the personal consumption. And using the assumptions for this period, which you have asked me to assume, that [686] is $20 per week, plus $250 per year, in 1973 that would have been about 10 percent of gross pay.

So in this period I took 10 percent of gross pay as a personal consumption.

In the later period—for the later period I used some family budget studies that have been done by the Bureau of Labor Statistics to estimate the difference in the expenditure of families with and without one of the adults. And by comparing families with what they call a moderate standard of living, by comparing standards with or without one of the adults, and with the number of children, you get some estimate of how much you should reduce a family's income by to recognize the personal consumption of the deceased.

Now, generally while the children would be at home a rate of about 25 percent would be appropriate when there's three or four children, but there would be a period in here when there would be no children at home—they would all have reached age 21—and at age 21 then I think it's reasonable to take 50 percent as the [687] estimate of personal consumption.

So in fact I took a weighted average of 25 percent for the years that the youngest child would still be under age 21, and at home, and averaged that with 50, for the years that the youngest child would be 21, and that average was 31. And that is why I subtracted this amount here, 31 percent of gross earnings.

MR. FLEISHER: Q. While you're still up there, Dr. Friedman, how reasonable is it to use the national figures for the annual rate of growth of earnings that you have used in those computations? A. I think it's reasonable, because we can compare that with what's happening with Mr. Liepelt's earnings under his current union contract, with what the national experience was during these same years.

And during—I do have—during the period 1973 through 1976, according to that contract, his earnings were rising at a rate of about 8 percent a year—8.1. The national rate during those same years on an average was 7.1.

[688] So (sic) the basis of that, I thought it would be realistic to assume the national rate would give a pretty clear indication of his own earnings growth over the future.

Q. Professor, you earlier gave us an example of what you called reducing a gross earning to present cash value? A. Yes.

Q. Have you in your example for the gross earnings of $46,000-plus, and the gross earnings for $306,000-plus, reduced them to present cash value? A. [689] No. This number should not be reduced to present cash value.

This is not something that would have happened in the future. This is something that has already happened.

In fact, this should be accumulated with interest, because in the meantime, if you didn't have your income, you'd have

to maintain a standard of living, you would have to borrow or use up your assets. So that actually there's no need to reduce this to present cash value.

In fact, quite the reverse is true. You should increase it. However, this later period must be reduced to present cash value, and I used the 7 per cent interest rate assumption.

Q. And, Doctor, why would that 7 per cent number be reasonable in discounting the present cash value in this day and age? A. May I go back?

Q. Sure.

(Whereupon, the witness resumed the witness stand.)

THE WITNESS: Well, the 7 per cent interest rate is a little bit higher than historical [690] experience over a long period of time, but since today there are bonds of a 20-year duration, where you can for sure earn a high yield, I thought it was necessary to consider that in making the calculation.

There are bonds, safe assets that you can invest in today and earn a yield of 7 per cent.

Now, you wouldn't invest all of your assets in any one security, because some of that money you'll need before the end of 20 years. And then you never know what price you'll get for a bond if you have to go and sell it before maturity, so you actually want to have a mixture of assets that are short-term, bank accounts, savings and loan certificates, combined with some assets that are long-term where they guarantee you a high yield for a long time.

In addition, you may even want to use some of the money to take a little more risk with higher yield than corporate securities. But I must remind you that every now and then

there's something like a Penn Central or New York State Municipal bonds which people believed to be safe [691] and then they turned out to be not safe.

MR. FLEISHER: Q. Professor, the numbers that you use for household service, the $4,158, and the $27,572, can you tell us the reasonableness and the way in which you calculate those numbers? A. Well, I can't give you a precise number for household service, obviously, but what I did do was to estimate on the basis of living in a home and taking care of it and having four children, one day per week, and in 1975, one day per week hiring someone at the average compensation of what the Bureau of Labor Statistics called the service industry, that is a mixture of plumbers, auto mechanics, babysitters, and so forth, that works out to about $1,456 per year.

And in that year, that was a little bit greater than 9 per cent of Mr. Liepelt's gross pay estimate.

Q. Professor, the 10 per cent number that you took for personal consumption, from '73 to '76, what calculation did you make, or what assumptions did you have to come up with that number? A. Well, you asked me to assume $20 per week—[692] $20 per week, plus $250 per year, and that's $1,290 a year. And I divided that by 13,000, which is approximately the 1973 earnings, and you can see that that's about 10 per cent. A little bit under 10 per cent.

Q. Can you tell us the reasonableness and rationale that you took in applying the 31 per cent figure for personal consumption in the later years of this deceased? A. Well, I used an average of the years when there would be children at home and years when there wouldn't be children at home. And over the 18 years when there would be a child at home, I assumed 25 per cent.

Then over the remaining years I assumed 50 per cent.

So taking an average of the 25 and 50 over the years which they apply, I got a 31 per cent average. So I used that.

Q. Doctor, why—is your dollar loss for fringe benefits reasonable and proper calculation in your opinion? A. Well, from my experience before with railroad unions, I had some data on the employer [693] contributions for the basic health benefits, hospital and disability plans, and—well, those numbers are quite substantial.

Family health insurance coverages (sic) about $800 a year. A little more than that. And that's 5 per cent of your gross pay if your gross pay is $40,000.

Now, in this case the employer contributes a total value of the health plan, so the 5 per cent is in my view a clear underestimate of the value of these fringe benefits. These are plans that a family will want to replace. These are plans that you can—you don't really want to do without just because a person is deceased, or loses his job. You'll have to replace them elsewhere.

In fact, you may not be able to find as good a plan for the same money elsewhere. So these are things of real value that you lose in losing your employment, or losing a worker in the family.

What I didn't use was vacation, holiday pay, meals on the road, and so forth, because you have to be alive to get those. And [694] that's—they're irrelevant.

Q. Doctor, can you actually calculate a dollar loss for the element of rearing, training, instruction, advice and guidance of the deceased's four children? A. No, I didn't try to put a price tag on that.

Q. Is there any statistics that are available, to your knowledge, for putting a dollar loss for those elements in regard to

minor children? A. I don't know of any that are commonly used for that purpose.

MR. FLEISHER: Thank you. You may cross-examine.

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. WHITE:

MR. WHITE: Q. Mr. Friedman, all of your calculations are based on the assumption that an individual would live the life span that that table that you refer to mentioned? A. The life expectancy was more than enough to go to reach age 65.

[695] Q. Yes. A. You know the life expectancy is like the average weight of a group of people; you have some people that weigh 100 pounds and some people that weigh 200. The average weight is 150.

So some people will not live that long. Some people will live a lot longer. And the life expectancy is an average.

* * *

[707] Q. What would the figures be if you took 6 percent instead of 7? A. As an interest rate?

[708] Q. Yes. A. They would be substantially larger. That is the total gross earnings loss, this present value would be larger, because you would need more money today invested at 6 percent to yield the kind of yield you would get if you invested it at 7 percent.

So 6 percent would lead to a higher estimate of monetary loss.

Q. Well, you mentioned municipal securities or bonds, I believe, being 7 percent being about the average yield? A. No. I think they yield substantially less. The highest rating, municipal bonds, the safest, my impression is that they're yielding less than 7 percent.

Q. Of course, if you have bonds like you mentioned, or I believe you referred to the New York State, you would lose everything, close to everything? A. You might be delayed in getting your money back when you wanted it. They haven't actually defaulted. They have just had a—

Q. New York City? [709] A. —a slow-down on paying them back.

Q. What about New York City? A. They haven't defaulted on their bonds.

* * *

[711] MR. WHITE: Well, any questions, I would like to be heard on. It will be along the lines that Counsel made the motion on before he put the witness on the stand.

* * *

(Whereupon, the following proceedings were had in open court, out of the presence of the jury.)

* * *

MR. WHITE: If the court please, Dr. Friedman mentioned in the course of his testimony something about income tax. I forget exactly what it was.

At any rate, the—I propose to and ask leave to ask him if he's taking into account [712] the fact that any amount recovered, either for death benefits or for injury, damages, is not subject to any income tax, which is a big difference.

THE COURT: That has been frowned upon consistently by Illinois Courts, as has reference to insurance.

A reference to insurance giving rise to motions for non-suit and references to freedom from income tax responsibility cases of recovery for injuries and deaths such as this are each entitled to swift response by way of granting of a motion for mistrial.

I am delighted that you asked your question and made your comment out of the presence of the jury, and I commend you for that, Mr. White.

However, if your objection in going into the area of income tax deals with the amount of tax that might be recoverable by the Government from the verdict amount, if one is returned in this cause, then the motion in limine is sustained.

MR. WHITE: I wasn't going to put it exactly that way. I was going to ask him if he took into [713] account in his computations that any amount paid in damages is not subject to income tax.

THE COURT: And that would give rise to an immediate motion for mistrial and I would have to grant it.

And consequently the motion in limine is sustained.

MR. WHITE: May it stand as an offer of proof?

THE COURT: Of course. It isn't necessary.

Let the record show that if you were to ask this man whether he knows if any recovery granted by the jury herein was subject to income tax or not, his answer would have to be that there will be no tax paid on any recovery.

I think that all parties here would stipulate that that is what his answer would be.

MR. WHITE: That is the law.

THE COURT: Yes, that is the law.

* * *

[738] THE COURT: Mr. White, you got (sic) a motion?

MR. WHITE: Yes. If the Court please, the Defendant wishes to make another motion to withdraw a juror and declare a mistrial.

This one—

THE COURT: I don't know that you had made such a motion heretofore, Counsel.

MR. WHITE: I think I have.

THE COURT: Proceed.

MR. WHITE: The witness is crying.

This one is that the Court erred in allowing Plaintiff's motion in limine, and in not permitting to ask the economist yesterday with reference to income taxes.

I call your honor's attention to the case of—

MR. LANDESS: If (sic) can interrupt my partner, Mr. White—

THE COURT: State your name for the record.

[739] MR. LANDESS: Yes. Robert Landess.

Judge, yesterday the Plaintiff relied on the case of Baird v. CB&Q—this is a recent Illinois case—in support of their motion in limine to prevent the Defendant from examining the economist on the income tax.

I read this case, and I have a photocopy of it, and the only mention of income tax that appears is at Page 468.

It's a very historical reference that during the trial the railroad attorneys were allowed—not allowed—it wasn't objected to—but, in fact, cross-examination of Plaintiff's economist, Dr. Cohen, as to income tax.

No objection was taken, and it was not a point on appeal.

The only point on income tax was the historical or factual value.

Perhaps the Court has seen it, but I have marked the appropriate pages.

The most recent decision on the admissibility of income tax during the course of a trial is the Burlington Northern versus [740] Boxberger, which is a case cited by the U.S. Court of Appeals.

THE COURT: Do you have any Illinois cases?

MR. LANDESS: If the Court please, under F.E.L.A., Federal Law applies, State Law does not.

It was a 7th Circuit case.

THE COURT: Do you have any Illinois cases that deal with F.E.L.A.?

MR. LANDESS: I have Federal cases, because Federal cases control, and this is what Boxberger says.

THE COURT: Are you suggesting there are no F.E.L.A. cases tried by the Illinois State Courts?

MR. LANDESS: No, I did not suggest that at all. My point is: The controlling law is Federal Law, not State Law. We have to look at the Federal decisions. This is what Boxberger says.

THE COURT: Can we look at Illinois decisions that interpret F.E.L.A. and Federal Law?

MR. LANDESS: If they are applying Federal Law. I'm suggesting that the 7th Circuit, in [741] Cox versus Northwestern Airlines permitted income tax testimony.

The most recent Federal decision is the Boxberger case, that I'm referring to the Court this morning, where it says it should be admitted.

For the purposes of the record, 529 Federal Reporter 2nd, 284.

I have a photostatic copy of the decision.

MR. FLEISHER: What is the decision?

MR. LANDESS: I'm sorry.

MR. HARRINGTON: 529 Federal Reporter 2nd, 284.

THE COURT: In this Boxberger opinion that you have shown us from the 9th Circuit, the Court after a detailed consideration of its view with regard to the admissibility of instructions dealing with income tax, states on Page 296, that four Circuits have upheld the trial judge's refusal to give an instruction that the award is non-taxable, and there they cite an opinion from the 10th Circuit, an opinion from the 5th Circuit, [742] an opinion from the 2nd Circuit, and an opinion from the 6th Circuit.

They cite with favor the 3rd Circuit. And they find in accordance with the ruling of the 3rd Circuit.

And, of course, that is their privilege.

But there is, I'm sure you'll agree, decided authority in these courts on the subject.

MR. LANDESS: Yes, I think you will also find that the courts referred to the 7th Circuit, the Circuit we are in, the Cox Case. I underlined the decision.

The Cox Case also applied Federal Law, and in the Cox Case, they allowed income tax.

THE COURT: Are you saying that this Court is bound by the findings of the 7th Circuit?

MR. LANDESS: I think this Court is bound to follow Federal Law.

THE COURT: Don't you acknowledge there is a division of opinion in the Federal Courts?

[743] MR. LANDESS: Yes. And I also acknowledge that the 7th Circuit, the Circuit we are—which we are located in, has favored evidence as to income tax.

I'm also acknowledging that this is the most recent decision in the Federal Courts as I know it, Judge.

THE COURT: And you therefore feel, because of an opinion in the 7th Circuit, that this Court is bound by that opinion?

MR. LANDESS: I think the Court should follow the decision in the 7th Circuit.

THE COURT: You don't answer my question. I know what you think the Court should follow.

I'm asking you: Do you think this Court is bound by the decision in the 7th Circuit?

MR. LANDESS: Yes, I do. I think you are bound by the ruling in the Cox Case, and you're bound by the most recent decision in the Federal Court, which is the Boxberger Case.

THE COURT: Even though that is in the 9th Circuit?

MR. LANDESS: Yes, Judge. I think that is [744] the most recent and the most enlightened opinion on the subject.

THE COURT: You feel that the Illinois Courts are bound by it?

MR. LANDESS: I think you should follow it, yes.

MR. FLEISHER: Your Honor, I'm sure that the Court is aware that in the field of economics there is a new area for law being made and being changed in all states, be it at State level or Federal level, almost on a daily basis.

The Boxberger Case itself, as the Court has ably stated, shows a complete division of opinion in the various Circuits.

The Baird Case, which was cited yesterday, not as to the tax situation, but can be found at 63 Illinois 2nd, 463, is an Illinois Supreme Court opinion in which the opinion was filed May 14, this year.

The reason that we mentioned the Baird Case is that this seems to be the most recent Illinois Supreme Court case which allows an economist to testify that wages will rise, at least as fast [745] as interest rates, and there is no such evidence in the Baird Case that was given by the economist yesterday.

THE COURT: I would like you to direct your remarks to this decision.

[746] MR. FLEISHER: Of the Illinois law that is apparent and clear on the issue of income tax is found, and has been held in the case of Hall v. the Chicago and North Western Railway Company, 5 Ill. 2nd, at Page 135. That is cited and quoted verbatim in the case of Allendorf v. the E. J. & E. Railway Company, which is found at 8 Ill. 2nd at Page 164.

THE COURT: What is the year of that 8 Illinois case?

MR. FLEISHER: The Allendorf case was decided in 1956. There is one short paragraph:

> "Appellee also points out that the testimony of the actuary was needlessly favorable to Defendant. Since the

trial of the instant case this court has held in Hall v. Chicago and North Western Railway Company, 5 Ill. 2nd 135, 'that the incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation.' "

That continues to be the Illinois law. [747] I.P.I. is patterned after that. This is in essence what your Honor ruled yesterday.

THE COURT: Can you show me anything in the Allendorf case that deals specifically with the question of income tax?

MR. FLEISHER: Well, the Allendorf case involves, as your Honor has noted, the specific use here of the actuary testifying to the present value of future contribution after deduction of income tax. And there was no objection made by the Plaintiff's attorney, and then the Defendants later appealed because one of the elements being an excessive verdict, and the language that your Honor has read shows that if the Plaintiff would have objected timely that pursuant to the Illinois law the court would have been bound to sustain the objection.

Therefore, the Allendorf case ends up by saying: Certainly where the Plaintiff allowed it to go in, the Defendant would have no cause or no standing to argue on a point that is inadmissible under Illinois law to begin with.

As I said, in the Allendorf case, it states:

[748] "Plaintiff's attorney acquiesced in this ruling as well as the giving of instruction No. 27. The estimate of the actuary, by deducting income tax, was more than $10,000 less than it would be without such deduction. Furthermore, the actuary's testimony was based upon future net earnings until the time decedent would have become 69 years of age."

Then it ends by saying:

"Thus Plaintiffs unnecessarily limited their recovery by asking for computation only until age 65."

THE COURT: May I see the 7th Circuit case?

MR. LANDESS: Judge, I don't have the opinion with me, but while Counsel was speaking I noted the Court referring to the Cox case. I underlined some language there. It's a 1967 case. I can have the case brought in, if your Honor wishes.

THE COURT: How do you handle this, Mr. Fleisher?

MR. FLEISHER: Your Honor, the Boxberger case, as you pointed out, is a 9th Circuit case. [749] The F.E.L.A. allows states, as your Honor knows, to have concurrent jurisdiction along with the Federal courts in the trail (sic) procedure of these matters.

The question—the limited question of income tax being used at the trial of a cause of action would, by any stretch of the imagination, at most be procedural. It certainly is not a substantive issue, as those issues which are defined under the F.E.L.A.

The specific instructions in the I.P.I., those being 160 on forward, give you the substantive law which Illinois has incorporated into the I.P.I.

There is no question in my mind that the one procedural instance of whether or not Federal Income Tax can be shown at any cause of action during the proceedings of an F.E.L.A. case would be considered procedural, and would follow state law.

The Illinois Supreme Court in the Hall case speaks clearly to that point. Hall versus Chicago and North Western was an F.E.L.A. case.

[750] The Allendorf case, which cites it, was an Illinois Supreme Court F.E.L.A. case.

To now look to Federal law on the narrow issue of Federal Income Tax numbers being or not being admissible in the testimony of an economist would therefore take away the choice of the Illinois Supreme Court in the F.E.L.A. on this procedural issue.

I submit to the Court the Illinois Supreme Court, not the Appellate Court, but the Supreme Court, has clearly and distinctly says this and has not been overruled in explicit terms, cites (sic) here again in Allendorf:

> "Appellee also points out that the testimony of the actuary was needlessly favorable to Defendant."

The Illinois Supreme Court agrees with this, and then cites the Hall case, which they ruled on subsequent to the Allendorf case. And then later in Allendorf—and the procedural question, and it's a very narrow procedural question, in the scheme of over $300,000 that this actuary has testified to, can do nothing but inflame the minds of the jury upon the question of Federal taxation.

[751] MR. LANDESS: Your Honor, I didn't hear any response to what I thought the Court's question was, and that is responding to the Cox case.

Mr. FLEISHER: I don't have the Cox case before me. My answer would be the same, regardless of what the Cox case says. I have no idea why Counsel did not bring in the Cox case. It's a 7th Circuit case that he's relying on. But the answer would be the same.

The question of state taxes or Federal taxes is the same procedure. This is a case filed in the Illinois courts, and I

think we're bound to follow the rules of the State of Illinois courts in this proceedings (sic).

MR. LANDESS: I think the Boxberger—the case that Counsel refers to, Hall, 5 Illinois, I believe that is a 1955 decision. Allendorf, which really doesn't discuss income tax, from what I hear Counsel saying, is a 1956 decision, and we are referred to the Baird case yesterday, which is a recent Illinois case, which they are showing at the trial level that cross-examination did in fact occur as to income tax. No objection [752] was taken, but it's in the body of the opinion that this had transpired.

Again, as far as applying Federal law, as we must here, the most recent and only 7th Circuit decision, that I am aware of, is the Cox case, and the Cox case says we should.

Boxberger, the most recent decision of all of Circuits, and that says we should.

Counsel has referred to the I.P.I. Instructions that apply to cases of this nature, and cited 160 and those following. My recollection of the appropriate instructions refers to the fact that a jury may take into consideration in finding an award of damages or amount of damages, deductions that would have been taken from the earnings or the income of the Decedent. They mention deductions specifically in that instruction.

So on the one hand Plaintiff is allowed to put on an economist who can testify and project into the future what the earnings of the Decedent may be. On the other hand, the Defendant is precluded from showing what the deductions from those gross earnings would be.

[753] We can't show with any certainty what those deductions are. We're precluded. It's really not a fair position of the Plaintiff in this case.

I submit that the law on this, this trend is in favor of allowing, though granted that the Court is absolutely correct, there is a split in the Federal Circuits, no question about that. The most recent case has allowed this trend.

I think it's the better reasoned opinions, Judge, and the 7th Circuit has found that in the Cox case.

I submit that the jury would have no reasonable rationale basis to arrive at an award here unless they are able to hear both sides of the story, not just one, not what he would earn but what he would have to pay out of that.

When Counsel says this may be insignificant or small, that is not true. That is what Boxberger is telling us here. They do make a decision. This may not be true in all cases.

[754] If a man has an income of only a thousand dollars, well, income taxes are going to be insignificant, and I think the McQueen Case decision, as mentioned in Boxberger, this knowledge, this will have no impact, but Boxberger and Cox say when you're getting into the $15,000 area, which we are in this case, as I understand from the testimony and as I have learned from the economist, that this will have a substantial impact, and our calculations show that it will have a substantial impact as to what they would actually realize.

I think that the Defendant is seriously prejudiced if he cannot, and we have not had that opportunity to show what deductions are. When a jury's given an instruction to say that they can consider deductions from this, and yet isn't given any evidence to show what those deductions may be, I submit that we have been prejudiced, Judge.

MR. FLEISHER: I'm sorry, Mr. White.

MR. WHITE: Just, Judge, adding one comment. The F.E.L.A. doesn't expressly confer jurisdiction on State

Courts. They say that if [755] the State Courts wish to accept F.E.L.A. litigation, it's up to the State Courts. And our State Courts I think started with out (sic) Superior Courts, are the ones that decided they would accept jurisdiction in F.E.L.A. cases.

It's not automatically bestowed on them by the F.E.L.A. Act.

MR. LANDESS: Just one thing. If—I think I should call it to the Court's attention, we're standing here trying an F.E.L.A. Case, and Boxberger stated that—my recollection of reading Hall—the Court in the Hall Case did not say the F.E.L.A. will allow this. It seems to me the opinion in this—the Hall Case did not construe that point as they properly should have.

MR. FLEISHER: Your Honor, there are a couple of things that seem to be changing here. First of all, the items under I.P.I. that a jury may consider are those of personal use or consumption, those that are expenditures.

There's nothing in I.P.I. that allows the jury to consider the effect of income tax, [756] Federal, State, by being any type of deductions.

Secondly, Mr. White's objection, when he asked to question this economist, was what the effect would be on taxation on this award, whatever it may be.

Now, as I understand Mr. Landess, they are going one step beyond that. Now they are asking that the economist be allowed under Illinois law to be questioned and testify as to the man's deductions for income tax.

MR. LANDESS: No, no, no, no, no, Counsel.

I—I don't mean to interrupt, but that was not my point at all.

May I proceed?

MR. FLEISHER: Why, sure.

MR. LANDESS: When I said: "deductions," my understanding of the I.P.I. is that the jury may consider what deductions—not tax deductions, Mr. Fleisher, but what deductions may be taken from the overall—from the gross, and obviously one of the deductions that would be taken would be the income tax.

I didn't mean to imply what deductions [757] he would (sic) under the income tax.

MR. FLEISHER: That is specifically another element, as opposed to what Mr. White raised in his objection.

Mr. White asked that he be allowed to question the economist in regard to what effect if any, taxation would have on an award by this jury, whether any of this money was subject to a taxation that a jury might give, or they might receive.

Today's objection is that this money from his earnings will be or would have been in the future is subject to going into the question of taxation. So that what we're doing specifically, is overruling Illinois law, specifically overruling I.P.I. and allowing a whole new area of questioning every single potential litigant who has a future wage loss as to what taxes would have been on those wages, or that wage loss.

The reason that it has never been allowed under Illinois law, and in the number of Federal jurisdictions, and other states as well, you get into complete and total speculation. [758] Who knows? In yesterday's paper, President-elect Carter is considering a major tax cut to take effect in 1977 right after he takes office.

THE COURT: All right. All arguments must end somewhere, and I'm about to have an end. And the ruling of yesterday will stand.

* * *

[1091] (The following discussion was held in Court outside the presence of the Jury.)

THE COURT: It seems the defense had a motion?

MR. WHITE: If the Court please, on behalf of the defendant I wish to make an offer of proof.

THE COURT: Proceed.

MR. WHITE: If we called an actuary by the name of Robert Barns (sic) he would qualify as trained, experienced actuary and that using work life expectancy tables with the decedent's age at death of 37.51 years, a period of calculation to date, 12-1-76, 3.02 years, period of further earnings 22.42 years, and he would deduct income taxes, State and Federal, amount to $57,000. In his computations and if he used a six percent interest rate the pecuniary interest of the survivors would be, total a hundred—present value would be $115,325.

THE COURT: A hundred fifteen thousand what?

MR. WHITE: $325.

Two, that he could use or he could [1092] testify that he worked primarily with pension funds, eighty-one and-a-half (sic) percent interest and including a five percent increase in future earnings, his present pecuniary value to survivor would be $138,327.

THE COURT: In other words, that's eight and three-quarters percent as opposed to eight percent?

MR. WHITE: Yes, that's right.

THE COURT: That figure came to what?

MR. WHITE: $138,327.

THE COURT: Thank you.

MR. WHITE: The reason I am making this as an offer is because of your Honor's previous ruling with reference to income tax.

THE COURT: Thank you, sir.

Anything else, gentlemen?

MR. WHITE: We would ask that he would also testify that fringe benefits should not be computed because the (sic) are continuing.

THE COURT: All right.

MR. FLEISHER: Your Honor, if I may, is this offer of proof being made in lieu of the testimony of this witness?

[1093] THE COURT: Apparently so. I understand it to be that way in light of the Court's ruling with regard to income taxes.

Mr. White has very properly made this statement for the record by way of an offering of proof as opposed to attempting to bring it out before the Jury which would not be possible in light of my prior ruling.

MR. FLEISHER: This witness will not be called to testify; is that correct, Mr. White?

MR. WHITE: For that?

MR. FLEISHER: For any purpose?

MR. WHITE: Not for any other purpose.

MR. FLEISHER: This man, what was his name?

MR. WHITE: Barns (sic).

MR. FLEISHER: Mr. Barns (sic) is not being called?

MR. WHITE: He is with the Wyatt Company.

MR. FLEISHER: He is not being called in your case to testify; is that correct?

MR. WHITE: That's correct but I would call him except for the ruling that has been made.

MR. FLEISHER: Then for the record, your [1094] Honor, the plaintiff would also like to bring to the Court's attention that Mr. Barns (sic) was not listed either in the defendant's answer to interrogatories or his name was not submitted to the plaintiffs pursuant to the Supreme Court 237 production order which was served on the defendants on November 15th.

That at that time—again, for the record, pursuant to the Court's direction, a conference was held at Mr. White's office in which a list was submitted by myself giving the names of all of the plaintiffs' witnesses called to testify pursuant to that 237 notice, which included our actuary, Dr. Friedman.

At that time it was represented that only those names who appeared in defendant's answer to interrogatories would be called at time of trial, so that in addition to the Court's previous ruling as to the income tax question, the plaintiff would like to make the record clear that we are renewing an additional objection to any testimony that this witness might have given for the reasons I just stated.

MR. LANDESS: In brief response, if I may, [1095] Judge.

We, in our trial preparation, really did not plan or contemplate the use of an actuary, when we had our meeting with Mr. Fleisher in our office, as he indicated, handed us his list of witnesses which included an economist. It was at this time, since he had raised the issue, that then after reviewing the report that he furnished us from Friedman, is that his name?

MR. FLEISHER: I should add, I also, pursuant to the 237 notice at that date, on the 15th, submitted Dr. Friedman's written report to Counsel which, I believe, was dated the 1st or second week of November.

MR. LANDESS: Yes, and it was at this time that we sought the services of an economist or actuary here to review the report to see if he can assist us in the trial of the case. Prior to that we had not contemplated—

THE COURT: I think by this time the record is clear.

MR. LANDESS: Could I just, for clarity of the record, to relate back to our objection or [1096] motion in limine on the use of income tax or evidence as to income tax, just make one further brief point, and that is, Mr. Fleisher alluded to the fact that he felt this was a procedural question for the record. We feel as though this is a substantive issue of damages in which the federal cases should apply. Not procedural, substantive and I could cite for the Court Reporter some cases or if you accept the statement—

THE COURT: Let the record show your statement.

MR. LANDESS: I might also say the other day when we were discussing disclosure of witnesses we were out in the hall and we did tell Bob here, and I tell one lawyer because they are acting jointly for both plaintiffs, I mentioned we

had consulted an actuary but we did not determine whether we would use him. This was two days ago.

MR. HARRINGTON: That doesn't alleviate the problem we have when you are supposed to produce.

MR. FLEISHER: This is the first time I [1097] have been given the name of the economist. I still have not received a report. I noted Mr. White read from the report dated November 23rd which would be eight days ago.

Pursuant to the report that I submitted under the 237 notice which was on November 15th, so I again submit to the Court and for the record that in the case of economist where the plaintiff has submitted in compliance to a reciprocal production order his economist along with his written report, that the defendant was able to then come into Court some seventeen days later and say now we wish to call an economist who obviously, from the offer of proof, would attempt to rebut a certain element of damages, then I believe the plaintiff would have the right to call in rebuttal a third economist, not necessarily his own because his own has been rebutted, and I believe the defendant would have a right to reopen his cross and call a fourth economist who rebutted the third who rebutted the second who rebutted the first and when does it all end.

MR. HARRINGTON: It's not part of my case.

* * *

(Whereupon, the following proceedings occurred outside of the presence of the jury)

* * *

[1199] MR. FLEISHER: Your Honor, if I may, on the record, plaintiff Liepelt submitted Instructions Nos. 30, 31 and 32

and 33. At this time the plaintiff Liepelt will withdraw Nos. 30, 32 and 33 and in lieu submit to defendants and the Court the following:

[1200] Off the record.

(Whereupon, a discussion was had off the record.)

THE COURT: Is there any objection to Plaintiff's proposed 30?

MR. WHITE: I don't understand it. I don't think the jury will.

MR. FLEISHER: That's IPI 16014 verbatim for wrongful death, as is 30A.

THE COURT: Is there any objection?

MR. WHITE: I object to giving both of them, Judge.

THE COURT: Sir?

MR. WHITE: I object to giving both of them.

THE COURT: Both which?

MR. WHITE: On pecuniary costs.

THE COURT: You're objecting to both 16014 and 16015?

MR. WHITE: Yes.

MR. FLEISHER: They are concurrent, your Honor. 16015 describes pecuniary loss and sets out the specific elements pursuant to IPI.

MR. WHITE: Both of them?

MR. FLEISHER: Pardon?

[1201] MR. WHITE: One or the other.

MR. FLEISHER: No.

THE COURT: Any objections?

MR. WHITE: Yes.

THE COURT: Have you stated your objections?

MR. WHITE: Yes.

THE COURT: Plaintiff's Instruction 30 and 30A will be given to the jury over the objections of the defendant.

* * *

[1251] THE COURT: The same paragraph that we are dealing with here.

30 has heretofore been ruled in over the objections of the defendant, as has 30A.

Are there any more instructions for the plaintiff?

MR. NAUGHTON: 31.

MR. LANDESS: Have we seen this?

MR. NAUGHTON: Yes.

MR. FLEISHER: Yes. I submitted it yesterday.

MR. NAUGHTON: Last night. I don't know what you did with them.

MR. LANDESS: 31?

MR. FLEISHER: Right.

THE COURT: 3109 in IPI?

MR. FLEISHER: Right.

THE COURT: Is there any objection to 31?

MR. LANDESS: The objection here in part is, I believe, 3109 falls within the damage instructions for wrongful death. The 160.12 of IPI gives the comment on the use of damage

instructions and I [1252] believe the Court will see here that the 30 series is supplemented with these and then down here replaces the 130 series (sic).

THE COURT: Do you have an instruction out of the 160 series?

MR. LANDESS: I was not planning on submitting any, no, Judge. Some have been submitted previously, of course, by plaintiffs.

THE COURT: I can see no prejudice or harm coming to any party by the submission of Plaintiff's Instruction No. 31 and so will be given over objections of the defendant.

* * *

[1263] THE COURT: Thank you. Now, we'll go to 19 and, of course, 19 will be rejected for reasons argued at length in the earlier part of the trial.

MR. White: What's that?

MR. LANDESS: Taxes.

THE COURT: Income tax.

* * *

INSTRUCTIONS TO JURY

* * *

[1417] The plaintiff Kandythe Liepelt brings this action in a representative capacity by reason of her being the administrator of [1418] the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.

* * *

[1423] If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably [1424] certain to suffer in the future by reason of the death of the decedent.

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death.

You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been [1425] likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt.

PROPOSED JURY INSTRUCTIONS

[C-190] *Plaintiff's Proposed Instruction No. 30.*

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

Source: Illinois Pattern Jury Instructions, Civil, § 160.14 (2nd Ed).

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

[C-191] *Plaintiff's Proposed Instruction No. 30A.*

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death. You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be

expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt.

Source: Illinois Pattern Jury Instruction, Civil §160.15 (2nd Ed).

[C-192] *Plaintiff's Proposed Instruction No. 31.*

The plaintiff Kandythe Liepelt beings this action in a representative capacity by reason of her being the administrator of the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the real parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.

Source: Illinois Pattern Jury Instruction, Civil §31.09 (2nd Ed).

[C-199] *Defendant's Proposed Instruction No. 19.*

If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

Source: Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284 (CA 9, 1975).

VERDICT

[C-163] We, the Jury find for both plaintiffs and against the defendant. We separately assess the damages for each plaintiff as follows:

Kandythe J. Liepelt, Administratrix of the Estate of Delroy Liepelt, deceased	$775,000.00
Mack Maynard, Jr.	$ 16,500.00

(Signatures Omitted)

JUDGMENT

JUDGE HOLZER DECEMBER 3, 1976 A.D.

(CAPTION OMITTED)

[C-208] This day again come the parties to this suit by their Attorneys respectively, and whereupon the Court instructs the Clerk to open and read the Verdict of the Jury, which Verdict is as follows to wit:

"We, the Jury, find for both Plaintiffs and against the Defendant. We separately assess the damages for each Plaintiff as follows, Kandythe J. Liepelt Adm. of the estate of Delroy Liepelt deceased, in the sum of SEVEN HUNDRED, SEVENTY-FIVE THOUSAND DOLLARS ($775,000.00), and for Plaintiff Mack Maynard, Jr., the sum of SIXTEEN THOUSAND, FIVE HUNDRED DOLLARS ($16,500.00)."

Therefore, it is considered by the Court, that the Plaintiff Kandythe J. Liepelt, Administratrix, do have and recover of and from the Defendant his said damages of $775,000.00, and it is further considered by the Court that the Plaintiff Mack Maynard, Jr. do have and recover of and from the Defendant his said damages of $16,500.00, in form as aforesaid by the Jury, assessed together with his costs and charges in this behalf expended and have execution therefor.

IN THE

Circuit Court of Cook County, Illinois

COUNTY DEPARTMENT, LAW DIVISION

(CAPTION OMITTED)

ORDER

[C-302] This matter coming on to be heard on motion of defendant, NORFOLK AND WESTERN RAILWAY COMPANY; for judgment notwithstanding the verdict or, in the alternative, for a new trial, or, in the alternative, for a remittitur, and the Court having considered defendant's post trial motions and memorandum of law in support of said motions, having heard arguments of counsel, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that defendant, NORFOLK AND WESTERN RAILWAY COMPANY's, motion for judgment notwithstanding the verdict be, and the same hereby is, denied;

IT IS FURTHER ORDERED that defendant NORFOLK AND WESTERN RAILWAY COMPANY's motion for a new trial be, and the same hereby is, denied.

IT IS FURTHER ORDERED that defendant NORFOLK AND WESTERN RAILWAY COMPANY's motion for a remittitur be, and the same hereby is, denied.

IT IS FURTHER ORDERED that there is no just reason to delay the enforcement or appeal of the above entitled cause.

ENTER: JUDGE REGINALD J. HOLZER
Feb. 25, 1977

ORDER ALLOWING CERTIORARI

Supreme Court of the United States

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

KANDYTHE J. LIEPELT, ADMINISTRATRIX, etc.

ORDER ALLOWING CERTIORARI.

Filed April 16, 1979.

The petition herein for a writ of certiorari to the Appellate Court of Illinois, First District is granted.

Mr. Justice Powell took no part in the consideration or decision of this petition.